1907
December 6.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

MUNICIPAL BOARD OF BULANDSHAHR (DEFENDANT) *v.* DAKKHAN LAL (PLAINTIFF).*

Act (Local) No. I of 1900 *(United Provinces Municipalities Act), section 3 (4)—Definition—"Street."*

Held that a lane which, though at one time private property, had been for upwards of thirty years used by the public generally and had been lighted, drained and swept by the Municipality, was a "street" within the meaning of section 3 of the Municipalities Act, 1900, and was not the less a street because it happened to be a cul-de-sac.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Ghulam Mujtaba* and Babu *Lalit Mohan Banerji*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

KNOX and AIKMAN, JJ.—The plaintiff, Dakkhan Lal, who is respondent to this second appeal, was the owner of a house which is situate in one of the inner lanes in the town of Bulandshahr. One end of the lane is closed, in other words the lane is a cul-de-sac. In front of his house he erected some cattle troughs and a thatched shed. Complaint was made by some of the residents of the mohalla living opposite the plaintiff's house. This complaint was made to the Municipal Board, and they served the plaintiff with a notice to remove the constructions which he had made, on the ground that they caused inconvenience to the people of the mohalla and also injuriously affected the sanitation of the place. The plaintiff filed objections, which were overruled by the Board, and he was ordered peremptorily to remove the troughs and the thatch. He failed to comply with this order, was prosecuted, admitted that he was wrong, was fined, and he himself pulled down the erections that he had made. He then instituted the suit out of which this appeal has arisen. He prayed for a declaration that the land upon which he had built was his own land and for an injunction to restrain the Municipality from interfering any further with it. He also prayed that the Municipality should

* Second Appeal No. 849 of 1906, from a decree of Girraj Kishore Dat, Additional Subordinate Judge of Aligarh, dated the 1st of February 1906, modifying a decree of Mubarak Husain, Munsif of Bulandshahr, dated the 24th of July 1905.

be ordered to rebuild the erections or to pay damages. The Court of first instance came to the conclusion that the land upon which the plaintiff had built, was his own private property and that he had not by the building that he had made encroached upon any street. It therefore held that the provisions of section 88, sub-section (1) of the North-Western Provinces and Oudh Municipalities Act, I of 1900, did not apply and that the Municipality was not justified under that section in the order which they had issued, but he held that they were in issuing the order justified by section 87 of the same Act. Whilst therefore he gave the plaintiff the declaration he asked for, he dismissed the rest of the claim. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and decreed the plaintiff's claim in full. The Municipal Board has come here in second appeal.

The case has been well argued before us by the learned vakils on both sides. They have taken us through the judgments and cited various authorities applicable to the question at issue. For the appellant it is contended that, accepting the findings of fact arrived at by the Court below, the conclusion of the learned Subordinate Judge to the effect that the lane was not a street as defined by the Municipalities Act was wrong. The word "street" as used in the Act, is defined in clause (4), section 3, as follows:—"Street means any street, road, thoroughfare, passage or place over which the public have a right of way, and includes the footway and surface drains of any such street, and any bridge, culvert or causeway forming part of any such street."

We have to consider whether on the facts found the place where the plaintiff made his constructions, is a place abutting or adjoining a street within the meaning of this Act. We would first observe that the fact that the lane is a cul-de-sac does not prevent it from coming within definition of street, so long as the public have a right of way over it. It appears from the evidence that upwards of thirty years ago a Deputy Collector named Tonochy was the owner of this property and that he erected houses and shops thereon. After his death the houses and shops together with some land were sold by auction to different persons. The map shows that these houses and shops are situate on both sides of the lane, which is closed at the north end, and that there are shops in the lane nearer the

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closed end than the plaintiff's house. There are also shops near the open end. This lane has been lighted and drained and is swept by the Municipality. When the Tonochy property was sold, the portion which forms this lane was not sold and has been freely used by the public for at least thirty years. Taking all the facts into consideration, we think the conclusion to be drawn from them when viewed together is that the lane is a public street as defined in the Act. This being so, the Municipality were acting within their rights in passing the order complained of. For the above reasons we allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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December 6.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHEO NARAIN (DEFENDANT) *v.* NUR MUHAMMAD AND ANOTHER (PLAINTIFFS). *

Civil Procedure Code, section 244—*Execution of decree—Purchase at auction-sale by decree-holder—Suit by decree-holder to obtain possession of property so purchased.*

Where the decree-holder himself purchases property at auction sale in execution of his own decree, but fails to obtain possession, his remedy is by application under section 244 of the Code of Civil Procedure: he cannot bring a separate suit for possession. *Seru Mohan Bania* v. *Bhagoban Din Pande* (1) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2) distinguished. *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (3), *Kattayat Pathumayi* v. *Raman Menon* (4) and *Kalian Singh* v. *Thakur Das* (5) followed. *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (6) referred to.

THE predecessors in title of the plaintiffs were purchasers of a 4-anna zamindari share owned by one Param in execution of a simple money decree held by one of them. The purchase was made on the 20th of April 1895.

In February 1902 the plaintiffs applied under section 318 to be put into possession of the property purchased, but their application was rejected on the 1st of March 1902 as beyond time.

* Appeal No. 36 of 1907 under section 10 of the Letters Patent, from the judgment of Aikman, J., in S. A. No. 521 of 1905, dated the 5th of April 1907.

(1) (1883) I. L. R., 9 Calc., 602.
(2) (1887) I. L. R., 14 Calc., 644.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1902) I. L. R., 26 Mad., 740.
(5) Weekly Notes, 1906, p. 87.
(6) (1892) L. R., 19 I. A., 169.

Thereafter, on the 18th of July 1904, the plaintiffs instituted the present suit to recover possession of the property purchased by their predecessor in title on the 20th April 1895, as above stated. The Court of first instance (Munsif of Lalitpur) dismissed the plaintiffs' suit. On appeal, however, the District Judge of Jhansi reversed the Munsif's decree, allowed the appeal, and decreed the plaintiffs' claim. The defendant appealed to the High Court. The appeal came on for hearing before a single Judge of the Court and was dismissed—*Cf.* Weekly Notes, 1907, p. 131. The defendant thereupon appealed under section 10 of the Letters Patent.

Mr. *G. W. Dillon* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The main question raised in this appeal is whether a claim for possession of property purchased by a decree-holder in execution of his own decree can be enforced by a separate suit, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure. The property of which possession is sought to be recovered falls a little short of a 4-anna undivided share of a certain village which was purchased by the decree-holders on the 20th of April 1895. That property is in the possession of the appellant Sheo Narain under a deed of gift from the widow of the judgment-debtor. No steps were taken by the purchaser to obtain possession until the month of February 1902, that is, nearly seven years after the date of the purchase, when he applied to the Court for possession under section 318 of the Code. That application was rejected as being barred by limitation on the 1st of November 1902. The present suit was instituted in 1904 for a declaration that the share of the property in question was not subject to a mortgage which had been set up in a prior suit by Sheo Narain and also for possession of it as unincumbered property.

The Court of first instance dismissed the plaintiffs' claim, holding that the share in question was not unincumbered and relying in support of his decision upon the memorandum of bids which was prepared by an Amin in the office of the Deputy Collector, from which it appeared that the property sold was

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subject to a mortgage for a sum of Rs. 148. On appeal the decision of the Court of first instance was reversed, and thereupon a second appeal was preferred to this Court. The learned Judge before whom the appeal came upheld the decision of the lower appellate Court, holding that there was no force in the contention raised on behalf of the appellant in that Court, that the suit was barred by the provisions of section 244 of the Civil Procedure Code. He observes in the course of his judgment:—"The mere fact that the auction purchasers or their representatives failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure does not deprive them of their right to bring a regular suit" and then quotes as an authority for this view the case of *Seru Mohan Bania* v. *Bhagoban Din Pande* (1) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2). In neither of these cases was the purchaser the decree-holder, as was the fact in the case before us. But there is no doubt that according to some early rulings the decision of the learned Judge would have been correct. Lately, however, several cases have come before this and the other High Courts in which the early rulings have not been followed. The earliest of these to which we need refer is the case of *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (3), in which it was held by Macpherson and Stevens, JJ., that proceedings for the delivery of possession to an auction purchaser, who was also the decree-holder, after sale in execution of her own decree, were proceedings in execution of the decree, and that when application for possession was resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised came under section 244 and must be decided under that section and not by a separate suit. The next case to which we would refer is that of *Kattayat Pathumayi* v. *Raman Menon* (4), in which a similar view was taken, it being held that proceedings taken by an auction purchaser to obtain possession of property purchased by him at a sale in execution of his own decree related to the execution, discharge or satisfaction of the decree within the

(1) (1883) I. L. R., 9 Calc., 602.
(2) (1887) I. L. R. 14 Calc., 644.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1902) I. L. R., 26 Mad., 740.

meaning of section 244 and that a separate suit for possession was not maintainable. The question again came before this Bench in the case of *Kalyan Singh* v. *Thakur Das* (1), in which the question was carefully considered and the decision of the Calcutta and Madras High Courts was followed. So far therefore as we are concerned the question is concluded by authority. We do not think that we are unduly extending the scope of section 244, and we say this with the more confidence, in view of the observations of their Lordships of the Privy Council in recent cases as regards the object and meaning of that section, in which they express approval of the facts that the Courts in India have not placed any narrow construction on its language:—see *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (2).

For these reasons we must allow the appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

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December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

MAHADEI (PLAINTIFF) *v.* BALDEO (DEFENDANT).*

Hindu law—Hindu widow—Effect of compromise entered into by a Hindu female with a limited estate.

Held that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court; the reversioners can only be bound by a decree made after a full contest in a *bonâ fide* litigation. *Gobind Krishna Narain* v. *Khunni Lal* (3) followed.

THIS was a suit to recover possession of certain zamindari property of small value, and was brought under the following circumstances. The property originally belonged to one Dayal, who died leaving a widow Musammat Anandi, a son Suraj Din and a daughter Sukhdei. Suraj Din succeeded to the property. On Suraj Din's death his widow, Musammat Batasia, took

* Appeal No. 35 of 1907 under section 10 of the Letters Patent from the judgment of Aikman, J., in Second Appeal No. 228 of 1906, dated the 16th of May 1907.

(1) Weekly Notes, 1906, p. 87. (2) (1902) 19 I. A., 169; s. c., I. L. R., 19 Calc., 683.

(3) (1907) I. L. R., 29 All., 487.

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possession of the whole estate. A suit was instituted against her by Musammat Anandi for a share in the estate. On the 26th of November 1898 Batasia and Anandi compromised the suit, and in terms of the compromise Anandi got a one-third share of the property. On Batasia's death on the 24th of January 1905, her daughter Musammat Mahadei brought the present suit to recover possession of the one-third share which had been made over to Anandi. The defendants to the suit were Musammat Anandi and Baldeo, a daughter's son of Musammat Anandi, to whom the latter is said to have made over the share by gift. The Court of first instance (Munsif of Allahabad) held that the plaintiff was not entitled to recover possession of the share whilst Anandi lived. It left it an open question as to whether the plaintiff would be entitled to get the share on Anandi's death. On appeal the lower appellate Court (Subordinate Judge of Allahabad) came to a different conclusion. It held that Musammat Batasia being a Hindu widow had no power to make the transfer, and decreed the plaintiff's claim. The defendants thereupon appealed to the High Court and their appeal coming before a single Judge of the Court was allowed and the decree of the first Court restored, *vide* Weekly Notes, 1907, p. 199. The plaintiff appealed under section 10 of the Letters Patent.

Mr. *W. Wallach* and Munshi *Gobind Prasad*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The decision of the learned Judge of this Court against which this appeal is preferred is wholly opposed to the principle laid down in a judgment of a Division Bench of this Court in the case of *Gobind Krishna Narain* v. *Khunni Lal* (1). In that case the Court held, following earlier rulings and citing the leading case of *Stapilton* v. *Stapilton* (2), that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court, and that the reversioners can only be bound by a decree made after a full contest in a *bonâ fide* litigation. This case was not reported until the

(1) (1907) I. L. R., 29 All., 487. (2) (1739) 1 W. and T., 230.

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20th of May 1907, and does not appear to have been brought to the notice of the learned Judge. The fact that the property involved is of little value is a matter which cannot be taken into consideration in determining the rights of the parties. In view of the ruling above referred to we must allow the appeal. We set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

1907
December 13.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BAHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* MUBARIK-UN-NISSA AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—"Shurkayan-i-shikmi."

The wajib-ul-arz of a village (Kandhla) in the Muzaffarnagar district gave a right of pre-emption, first to *shikmi* co-sharer (*shurkayan-i-shikmi*), secondly, to share-holders descended from a common ancestor (*shurkayan-i-jaddi*), and thirdly, to *khewatdars* in the mahal (*khewatdaran-i-mahal*). The mahal was divided into seven *pattis* and the land in dispute was situated in *patti* Khail, *thok* Bhuria. The pre-emptors were co-sharers in *patti* Khail. One of the vendees was a co-sharer in the mahal, but not in *patti* Khail *Held* that, regarding the whole context of the wajib-ul-arz, the expression *shurkayan-i-shikmi* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal, and the plaintiffs were not therefore entitled to pre-emption. *Jeymul* v. *Kesree* (1) and *Abdul Shakur* v. *Mendai* (2) referred to.

THIS was a suit for pre-emption of a zamindari share in mauza Kandhla in the district of Muzaffarnagar. The property in dispute formed part of khewat Nos. 22 and 33, portion of a mahal of 15 biswas. The mahal was divided into seven *pattis*, and the land in dispute was situate in *patti* Khail, *thok* Bhuria. The plaintiffs were co-sharers in *patti* Khail while the defendant Musammat Mubarik-un-nissa was a co-sharer in the mahal, but not in *patti* Khail. In the wajib-ul-arz of the village the persons in whose favour a right of pre-emption was given were classified under three heads :—

* Second Appeal No. 1077 of 1905, from a decree of L. G. Evans, District Judge of Saharanpur, dated the 22nd of June 1905 reversing a decree of Madho Das, Subordinate Judge of Saharanpur, dated the 1st of September 1904.

(1) Agra, F. B. 1866, p. 171. (2) (1901) I. L. R., 23 All., 260.

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(1) Shikmi share-holders (*shurkayan-i-shikmi*).

(2) Share-holders descended from a common ancestor (*shurkayan-i-jaddi*) and

(3) Khewat-dars in the mahal (*khewatdaran-i-mahal*).

The court of first instance (Subordinate Judge of Saharanpur) held that the plaintiffs had a preferential right of pre-emption and gave them a decree, but on appeal the District Judge reversed this decree, holding that neither the plaintiffs nor the defendants answered the description of *shikmi* share-holders, but came under the third clause as other *khewatdars* in the mahal, and that therefore the plaintiffs had no preferential right of pre-emption as against the defendants. The plaintiffs appealed to the High Court.

Sir *Walter Colvin*, Mr. *M. L. Agarwala* and Babu *Parbati Charan Chatterji*, for the appellants.

Pandit *Moti Lal Nehru*, Mr. *R. Malcomson* and Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The sole question for determination in this appeal turns upon the meaning to be assigned to the expression "*shikmi*" share-holders used in the wajib-ul-arz of village Kandhla in the Saharanpur judgeship. On the part of the appellant it is contended that the word "*shikmi*" denotes those who are more closely connected with the vendor in a *thok* and *patti* in which the property, the subject of the sale, is situate than proprietors in another *patti* of the same mahal who are not proprietors in such *thok* or *patti*. On the part of the respondents the contention is that the expression *shikmi* share-holders denotes share-holders born of the same *shikam*, that is, uterine brothers or blood relations. The property in dispute formed part of khewat Nos. 22 and 33, portion of a mahal of 15 biswas. The mahal is divided into seven *pattis* and the land in dispute is situate in *patti* Khail, *thok* Bhuria. It is admitted that the plaintiffs appellants are co-sharers in *patti* Khail, while the defendant Musammat Mubarik-un-nissa is a co-sharer in the mahal, but not in *patti* Khail. In the wajib-ul-arz of the village the persons in whose favour a right of pre-emption is given are classified under three heads:—

(1) Shikmi share-holders (*shurkayan-i-shikmi*).

(2) Share-holders descended from a common ancestor (*shurkayan-i-jaddi*) and

(3) Khewatdars in the mahal (*khewatdaran-i-mahal*).

The learned Subordinate Judge held that the plaintiffs had a preferential right of pre-emption and gave them a decree, but on appeal the learned District Judge reversed this decree, holding that neither the plaintiffs nor the defendants answered the description of *shikmi* share-holders, but came under the third clause as other *khewatdars* in the mahal, and that therefore the plaintiffs had no preferential right of pre-emption as against the defendants.

The word "*shikmi*" in connection with co-sharers in land is rarely met with and is a vague and indefinite term. We have been referred to two cases only in which the expression "*shikmi* share-holders," is to be found, and we know of no other. In the case of *Jeymul* v. *Kesree* (1) the construction of a wajib-ul-arz in which the expression "*shikmi shurkayan*" occurred was referred to a Full Bench. In the referring order it is stated that the expression "*shikmi* sharers" was said to have acquired the local meaning of sharers who are blood relations, when these words occur in administration papers in the Saharanpur district, and reference is made to a judgment of the Principal Sadr Amin in which is a statement to the effect that the pleaders on both sides admitted that the phrase *shikmi* sharers expresses no distinct meaning, but that its local meaning is "a sharer who is a blood relation to another sharer." The case was referred to the Full Bench so that a definite rule of construction might be laid down. According to the head-note the Full Bench decided that the proper construction of the words "*shikmi shurkayan*" was that they gave a preference to the sharers in the *thoks* over those who were merely sharers in the village. This head-note is altogether inaccurate, for we find on reference to the judgment that the Full Bench declined to decide what the meaning of the expression was or whether it had a special local meaning. They decided the case upon a later passage in the wajib-ul-arz, which gave to the share-holders in the same *thok* a preferential right of pre-emption over share-holders

(1) Agra. F. B., 1866, p. 171.

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who were merely sharers in the village. This case therefore does not help the appellants.

The other case to which we were referred is that of *Abdul Shakur* v. *Mendai* (1). The wajib-ul-arz which was considered in that case conferred the right of pre-emption on seven classes of persons, each class having a preferential right over the class next following. The first two classes were composed of persons who were related to the vendor, the remaining classes consisted of persons who were co-sharers of the vendor. By reference to the record we find that in the first class came own brothers; in the second class near relations, and in the third *hissadaran shikmi*. In the fourth class came the lambardar of the *behri*, or *patti* and in the fifth a co-sharer in the *patti*, while the sixth and seventh classes were respectively composed of the lambardars and co-sharers in the village. Sir Arthur Strachey, C.J. and Banerji, J., held that the expression "*hissadaran shikmi*" did not necessarily apply to any idea of subordination, but was rightly considered as applicable to persons who were co-sharers in the particular *khata* of the *patti* in which the land sold was situate. In that case it will be noticed that the first two classes exhausted the relations by blood, and it was therefore necessary to attach a meaning to the words "*hissadaran shikmi*" other than that of blood relations. Now, as our Brother Banerji pointed out in his judgment in that case, the various clauses of a wajib-ul-arz are not recorded with as much precision as is desirable, and therefore the intention must be gathered in each case from the whole context and the surrounding circumstances. He referred to the derivation of the word "*shikmi*" and pointed out that its primary meaning was inclusion, but the question is, inclusion in what? If we look to the derivation of the word, we should be disposed to hold that it referred to blood relations, such as uterine brothers, that is, the fruit of the womb, and not to share-holders in a mahal or a sub-division of a mahal.

The contention that the framers of the wajib-ul-arz in this case had blood relationship in view when this expression was used gathers some support from the fact that the second category

(1) (1901) I. L. R., 23 All., 260.

of pre-emptors is composed of share-holders (*shurkayan*) descended from a common ancestor. Relationship by blood rather than propinquity or vicinage would seem to have been in view in determining the priorities of claimants for pre-emption. A sequence of classes according to which share-holders descended from a common ancestor would be interposed between share-holders in a sub-division of the mahal and share-holders in the mahal would not be natural. In the third category the word "*shurkayan*" is not used to denote share-holders, but a different word, namely, "*khewatdar*." If the word "*shikmi*" implies connection with the vendor by reference to inclusion in property in which both are share-holders, it must have reference to a sub-division of the mahal itself, seeing that in the third category come co-sharers in the mahal. To what sub-division of the mahal then would it apply? Is it to co-sharers in the *patti* or in the *thok*, or in the *khata* or a sub-division of the *khata*, and is there a preferential right given to share-holders in each of these sub-divisions, and if so, in what order? If we accept the argument advanced on behalf of the appellants, we must define *shikmi* share-holders as limited to share-holders in the *thok*, or in the *patti*, or in the *khata*, or in the sub-divisions of the *khata*. In other words we should be considerably enlarging the category of pre-emptors. We do not think that this was intended. Regarding the whole context of the wajib-ul-arz, we think that the expression "*shikmi shurkayan*" was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal.

For these reasons we think the learned District Judge rightly dismissed the plaintiffs' suit. We dismiss the appeal with costs.

Appeal dismissed.

1907
December 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NAND KISHORE (PLAINTIFF) *v.* ANWAR HUSAIN AND OTHERS (DEFENDANTS).*

Lease—Condition for payment of rent in advance—Suit by purchaser of demised property for rent—Registration—Notice.

Certain property was leased for a term of 10 years, the lease containing a provision to the effect that if at any time during the currency of the lease the lessor should demand any portion of the rent in advance from the lessee, the latter should be bound to pay it on obtaining a receipt. Subsequently to the execution of this lease the demised property was sold by auction in execution of a decree. The auction purchaser sued the lessee for rent, but was met by the plea that the rent claimed had been paid to the lessor in advance under the terms of the lease. The lease was registered and it was found that the auction purchaser had not made inquiry of either the lessor or the lessee as to whether or not any rent had been paid in advance according to the terms of the lease. *Held* that under these circumstances the plaintiff was not entitled to recover.

THE facts of this case are as follows :—One Sajjad Husain was the owner of certain property at or prior to the year 1898. On the 21st of September of that year he granted a lease to the defendant of portion of this property for a term of 10 years, that is, from 1306 to 1315 Fasli (inclusive). The lease contained a provision to the effect that if at any time during the currency of the lease the lessor should demand any portion of the rent in advance from the lessee, the latter would be bound to pay it on obtaining a receipt. The lease was registered. On the 25th of December 1902 a sum of Rs. 1,520 was paid in advance for rent by the lessee to the lessor on demand made by the lessor in pursuance of the above mentioned provision in the lease. This payment, it is found, satisfied the rent payable up to the end of 1314 Fasli. On the 20th of October 1903 the plaintiff purchased the property so leased at a sale in execution of a decree obtained against Sajjad Husain. He instituted the suit out of which this appeal has arisen for recovery of the rent for the year 1311 and part of 1312 Fasli, which had been already paid. He was met by the defence that the rent for that period had already been paid to Sajjad Husain under the provision in the lease. The

* Second Appeal No. 881 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 29th of June 1905 reversing a decree of Ajudhia Prasad, Assistant Collector, 1st Class, Sambhal, dated the 11th of May 1905.

Court of first instance (Assistant Collector) decreed the plaintiff's claim practically in full. On appeal by the defendants, however, this decree was reversed and the suit dismissed. The plaintiff appealed to the High Court.

Sir *Walter Colvin*, Mr. *W. K. Porter* and Lala *Girdhari Lal Agarwala*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question for determination in this litigation is a novel one. One Sajjad Husain was the owner of certain property at or prior to the year 1898. On the 21st of September of that year he granted a lease to the defendant of portion of this property for a term of 10 years, that is, from 1306 to 1315 Fasli (inclusive). The lease contains a very unusual provision to the effect that if at any time during the currency of the lease, the lessor should demand any portion of the rent in advance from the lessee, the latter would be bound to pay it on obtaining a receipt. The lease was registered and is not disputed here. On the 25th of December 1902 a sum of Rs. 1,520 was paid in advance for rent by the lessee to the lessor on demand made by the lessor in pursuance of the provision in the lease to which we have referred. This payment, it is found, satisfied the rent payable up to the end of 1314 Fasli. On the 20th of October 1903 the plaintiff appellant purchased the property so leased at a sale in execution of a decree obtained against Sajjad Husain. He instituted the suit out of which this appeal has arisen for recovery of the rent for the year 1311 and part of 1312 Fasli, which had been already paid. He was met by the defence that the rent for that period had already been paid to Sajjad Husain under the provision in the lease.

The question is whether under such circumstances this is a good defence to the suit. As we have said, the lease is a registered document and the plaintiff appellant must be deemed to have purchased with knowledge of it. It was open to him when he was contemplating the purchase to make inquiry of the lessor or lessee as to whether or not any rent had been paid in advance according to the provision in the lease. He appears to have neglected to do so and purchased the property, no doubt, in the belief that he would be entitled to the rent from the date of purchase for the

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remainder of the term. But for the fact that the lease was a registered document, and that the rent had been paid *bonâ fide* in advance, in accordance with the condition in it, the plaintiff would probably have been in a position to establish his claim; but in view of the fact that the lease was registered and that payment of the rent claimed has been made in accordance with it *bonâ fide* before the date of the plaintiff's purchase, we are unable to dissent from the decision of the learned District Judge. The payment of rent before it becomes due is not ordinarily a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the lessor with an agreement on his part that when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay the rent—see *De Nicholls* v. *Saunders* (1). We must hold, in view of the facts in this case, that the rent sought to be recovered in this suit was satisfied pursuant to the provisions of the lease by the advance previously made. The plaintiff appellant cannot complain, inasmuch as he did not take the precaution of making inquiry as to whether or not any money had been paid in advance as provided for by the document. We therefore dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
1907
October 29,
December 5.

SURAJMANI AND OTHERS (DEFENDANTS) *v.* RABI NATH OJHA AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Gift—Construction of deed of gift—"Malik"—Gift to widow as "malik wa khud ikhtiyar"—"Absolute ownership"—Heritable and alienable estate—No distinction between male and female donee.

A Hindu executed a deed of gift of immovable property, to take effect after his death, to each of his two wives and his daughter-in-law, "as owners (maliks) with proprietary powers." One of his widows on coming into possession of her share made a will disposing of it in favour of her brother. In a suit by the next heirs of the donor questioning her power of alienation

Held that in the true construction of the deed the widow took a heritable and transferable estate in the property. The use of the word "malik" implies "absolute ownership" unless there is anything in the context or

Present :—Lord ROBERTSON, Lord COLLINS, and Sir ARTHUR WILSON.

(1) (1870) L. R., 5 C. P., 589.